No. 91-948

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

CHURCH OF THE LUKUMI BABALU AYE, INC.
and ERNESTO PICHARDO,
Petitioners,

v.

CITY OF HIALEAH,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF THE UNITED STATES CATHOLIC CONFERENCE AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

MARK E. CHOPKO *
General Counsel
JOHN A. LIEKWEG
Associate General Counsel
U. S. CATHOLIC CONFERENCE
3211 Fourth Street, N.E.
Washington, D.C. 20017-1194
(202) 541-3300
* Counsel of Record

Of Counsel:
MICHAEL F. MOSES
Attorney

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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INTEREST OF *AMICUS*

The United States Catholic Conference ("Conference") is a nonprofit corporation organized under the laws of the District of Columbia. Its members are the active Catholic Bishops in the United States. The Conference advocates and promotes the pastoral teaching of the Bishops in diverse areas of the nation's life, such as the expression of ideas, fair employment and antidiscrimination policies, family life, and the rights of religious communities. When permitted by court rules and practice, the Conference files briefs as *amicus curiae* in litigation of importance to the Catholic Church and its people in the United States. Values of particular importance to the

Church are the protection of the rights of religious organizations and their adherents, and the developing jurisprudence surrounding the Free Exercise Clause of the first amendment.

This case gives the Supreme Court its first opportunity to refine its interpretation of the Free Exercise Clause after *Employment Division v. Smith*, 494 U.S. 872 (1990). The present case involves a city ordinance which the district court below found directly proscribed petitioners' religious practices. Petitioners urge a higher level of scrutiny upon the city's efforts to discriminate against them; the city urges minimal scrutiny on the grounds that the ordinance on its face applies neutrally across the board. More basic perhaps than whether either side is ultimately right about the level of scrutiny, or who has the burden of proof, is the shape and direction of Free Exercise jurisprudence after *Employment Division v. Smith*. It is to that issue—and that issue alone—that the Conference speaks. Accordingly, the Conference takes *no position* whether the petitioners or the city should prevail in this dispute.

Through counsel, the parties have consented to the appearance of this *amicus*.

SUMMARY OF ARGUMENT

Faced with what a majority believed was a request for a special exception to a generally applicable criminal drug statute, *Employment Division v. Smith* found that the Free Exercise Clause did not justify such an exception. Only the legislature could decide whether to depart from the state's criminal law. In so ruling, however, a bare majority expressed concern with litigation over increasingly diverse claims expressed in religious language. 494 U.S. at 888-89. The Court attempted to fashion a single test of deference to the legislature that could be utilized to resolve many of the complex free exercise claims that arise in the context of our modern pluralistic society.

Smith has made it much more difficult for religious adherents to prevail in litigation when their sincere religious practices are, in fact, substantially burdened by government action. Indeed, surveys of cases decided after *Smith* indicate that its application has resulted in a more thoroughgoing rejection of religious claims than had existed in the previous twenty years.[1]

The Court alternately has raised the hope that religious organizations might be able to turn to legislators and executives for more favorable or sensitive treatment, a treatment which they had heretofore expected to find in the courts. Legislative and executive treatment favorable to religion has proved elusive, for political and other reasons. After *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989), the prospect of affirmative legislative relief being sustained under the Establishment Clause has dimmed. After *Smith*, the prospect of affirmative judicial relief under the Free Exercise Clause has also dimmed. Rather than serving as an article of personal protection through which individuals and their religious organizations, especially minorities, might have some hope of redress from the judiciary, the Free Exercise Clause seems to have been abandoned to the political process, a result which the majority candidly observed would leave minorities at a "relative disadvantage." *Compare West Virginia Board of Education v. Barnette*, 319 U.S. 624, 638 (1943), *with Smith*, 494 U.S. at 890. Religion is not the only thing abandoned by *Smith*. History and tradition, the key considerations applied by this Court in Religion Clause cases, have likewise been lost along the way. *See* McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409 (1990). If it had been the guide for judicial review, relegation

[1] Much of this litigation is summarized in a recent report of the Congressional Research Service, D. Ackerman, *The Religious Freedom Restoration Act and the Religious Freedom Act: A Legal Analysis*, CRS American Law Division (Library of Congress, April 17, 1992).

of religious practices to the political branches alone would not have been this Court's solution.

This Court should not permit its Free Exercise jurisprudence to continue to develop along the lines suggested in *Smith*. To do so disserves the purposes of the Bill of Rights and the constitutional protection it affords individuals, their organizations, and communities of faith. To do so would ultimately prove more frustrating to the Court and to religious communities, whose basic practices are now more susceptible to restriction. It is not too soon to begin the process of confining *Smith* to its facts and begin a new commitment to the protection of religion. As a start, the Court should consider some objective guidelines to define religious practices protected under the Free Exercise Clause and add substance to the level of scrutiny appropriately placed on government whenever such a practice is burdened.

This case gives the Court an opportunity to provide additional clarification in light of the judicial experience after *Smith*, and in anticipation of additional challenges being filed. This *amicus* takes no position on the merits of the underlying dispute.

ARGUMENT

To reassure its citizens of its intentions, the Framers of our Constitution denied the new Congress the power to "prohibit[] the free exercise" of religion. U.S. Const., amend. I. In a new country already experiencing political, social, cultural, and religious pluralism,[2] any other course would have been futile at best and divisive at worst.[3] The prospect that any citizen might resist the

[2] I A. Stokes, *Church and State in the United States*, 228-30 (1952).

[3] For this reason, James Madison initially opposed an amendment on religion as simply unnecessary. III *Debates in the Several State Conventions on the Adoption of the Federal Constitution*, 330 (J. Elliot 2d ed. 1836).

power of government and the prerogatives of shifting political majorities proved a significant attraction to those fleeing from a religious conflict borne of bigotry. Immigrants brought their own faiths, beliefs, and practices. Each new culture added to the diversity and, touching the old arrivals, strained the civic harmony. Although occasionally ignored in *practice* to the detriment of individuals and faith communities, the *promise* of freedom of religious practice, except when those practices actually threatened the public health, safety, or order, endured. At a fundamental level, there was consensus that religious freedom was basic to the life of this country, so much so that the protections of the Religion Clauses were extended to all citizens to resist even the action of state governments. *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (Free Exercise Clause); *Everson v. Board of Education*, 330 U.S. 1 (1947) (Establishment Clause).[4]

The presence of the religious liberty protection in the Bill of Rights is important. *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972). It confirms that these values were elemental to the Framers and adds an essential, personal dimension. The Bill of Rights preserves the rights of the few and the powerless from the political will of the many and powerful. *West Virginia v. Barnette*, 319 U.S. at

[4] Commentators attribute some of the lack of doctrinal clarity to the separate incorporation of both halves of the Religion provisions. Glendon and Yanes, *Structural Free Exercise*, 90 Mich. L. Rev. 477, 481-86 (1991) (pointing to Establishment Clause interpretations that penalize Free Exercise). Whether there is one, two, or more Religion Clause(s) is not the point of this discussion. This discussion is about constitutional values and judicial consistency, and their applications to religious practices in litigation. *Smith* is a symptom, not the problem. Indeed, one of the disturbing developments characterized by *Smith* is the Court's continued willingness to construe the Clauses as if they were intended to achieve different ends and different objectives. A review of Glendon and Yanes, for example, would helpfully illuminate the roots of the problem and begin a process of reconstruction of Religion Clause(s) jurisprudence. *Id.* at 478.

638-39.[5] When enforced by this Court, the Free Exercise Clause ensured that religion was free to "flourish according to the zeal of its adherents and the appeal of its dogma." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). Barely ten years ago, an overwhelming majority of this Court stated "the Free Exercise Clause . . ., by its terms, gives *special* protection to the exercise of religion." *Thomas v. Review Board*, 450 U.S. 707, 713 (1981) (emphasis added). The Court was involved in the shape and direction of a jurisprudence providing religious claims significant procedural protection.

The Court seemingly abandoned its important role in protecting religious practices in *Smith*. A bare majority there held that, unless a legislature or executive was politically insensitive enough to single out religion for adverse treatment,[6] judges would not be required to scrutinize governmental action that impaired a religious practice to determine whether the government had demonstrated a narrowly drawn means to achieve a compelling interest. 494 U.S. at 882-85. Instead, the religious claimant would now bear the burden of proving that the government's action was irrational.[7] As this Court has

[5] McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1416-17 (1990).

[6] In *Smith* the majority alluded to a number of possible exceptions for litigation of claims involving the autonomy and governance of religious communities; claims where a statute already provided for individualized exemptions; and claims implicating several rights. *Employment Division v. Smith*, 494 U.S. at 881-82. The scope of these exceptions is not clear.

[7] Demanding that the proponent of religion (not the opponent) bear the burden of proof is a recent result in this Court and can produce unfair and impractical results. Under the Establishment Clause in *Aguilar v. Felton*, 473 U.S. 402 (1985), the Court disregarded a factual record in which not a single "establishment" was established over two decades. The result has been that tens of thousands of educationally disadvantaged children have been deprived of much needed remedial services, or have received inferior

recognized, the outcome of litigation, and the vindication (or lack thereof) of legal rights, depends very often on the process by which cases are adjudicated. *Speiser v. Randall*, 357 U.S. 513, 520 (1958). This new approach has set the judiciary on a course contrary to history, jurisprudence, and the Court's own important role in protecting religious liberty. It has resulted in an uncertain recourse to the legislature at a time when this Court seemingly has foreclosed the licitness of particular legislative relief. The shift has resulted in an easier path for courts, legislators, and executives to reject or ignore sincere religious claims. Under *Smith*, religion, long thought the "First Freedom," is treated "like everything else." *Smith* is bad law and bad policy. It should be reconsidered and abandoned.

I. THE COURT MUST REVISIT ITS FREE EXERCISE JURISPRUDENCE BECAUSE OF *EMPLOYMENT DIVISION v. SMITH*.

The prominent role of religion in the life of the American people is evident. The vast majority believe in God and attend religious services.[8] More than any other factor in their lives, religion shapes their purpose, direction, and activities. Many schedule their daily and weekly activities around the timing of worship. People mark important events in their lives—births, deaths, marriages, and the attainment of adulthood—by religious observances. The calendar year is even dictated, for a religious adherent, by activity associated with the practice of faith. Religious demands become matters of obligation, not whims of

services at greater public expense. The proponents of the remedial education programs in religious schools failed because they could not prove there would never be a violation, except through pervasive surveillance (*i.e.*, excessive entanglement). *See* Chopko, *Has U.S. Society Become Anti-Religious?* 21 Origins 306, 307 (Oct. 1991).

[8] G. Gallup & J. Castelli, *The People's Religion: American Faith in the 90's*, at 4 (1989).

caprice or choices of convenience. Values and practices, when internalized, become articles of faith, acted out daily. More than just a strong moral code, articles of faith point adherents toward lasting, and even everlasting, realities.

Precisely because these matters of religious faith are matters of obligation, the Framers, themselves people of great faith and devotion, placed a high premium on their protection. As a matter of constitutional principle, religion would be entitled to benevolent treatment at the hands of government. Our amended Constitution provides that each individual has the right to practice his or her religion as long as it does not actually and significantly threaten the public health, safety, or order. The engines of government, perhaps prodded by the judiciary, have endeavored to provide such benevolent treatment. They did so, as matters of sound public policy, following the dictates of constitutional law. The difficulty with *Smith*, at bottom, is that it undermines this long history and tradition, abandons the historic role of the Court, and jeopardizes what, for many people, are matters of deep religious conviction.

A. *Smith* Departs From History And Tradition.

This Court consistently relies on history for guidance in interpreting constitutional text, especially the Religion Clauses. *Lynch v. Donnelly*, 465 U.S. 668, 673-78 (1984); *Marsh v. Chambers*, 463 U.S. 783, 786-92 (1983). Even though the Court has looked to history and tradition in construing the Establishment Clause,[9] the majority opinion in *Smith* seemed to ignore history and tradition altogether in construing the Free Exercise Clause. That error should be corrected.

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[9] The better view of the historical treatment of the Establishment Clause is found in the dissenting opinion of Chief Justice Rehnquist in *Wallace v. Jaffree*, 472 U.S. 38, 91 *et seq.* (1985). *See also* Chopko, *Intentional Values and the Public Interest—A Plea for Consistency in Church/State Relations*, 39 DePaul L. Rev. 1143, 1162-69 (1990) (summarizing and citing authorities).

A thorough treatment of the history and tradition embodied in the Free Exercise Clause is found in an article by Professor Michael McConnell, published by the *Harvard Law Review* contemporaneously with the decision in *Smith*.[10] The article recites in great detail the anecdotal, documentary, legislative, and judicial history of the understanding of protection of individual religious practice, prior to, during, and immediately following adoption of the Free Exercise Clause. Professor McConnell's scholarship indicates considerations that should illuminate Free Exercise jurisprudence, and any reconsideration of *Smith*. That anecdotal, documentary, legislative, and judicial history points to one overarching theme. In a clash between the dictates of conscience and the dictates of government, the individual *religious* conscience is to be given the benefit of every doubt. Absent grave reason, the government is not empowered to force an individual to forego religious convictions. Our history and tradition surrounding adoption of the Free Exercise Clause shows that when legislatures burden religion, the judiciary is empowered to provide relief. Until *Smith*, the Court did not abandon claimants to the vagaries of partisan politics. The majority's willingness to disregard history not only led to the flawed decision in *Smith*, but also undermines the legitimacy of its promise, stated elsewhere in the case law, that it would rely on history and tradition in construing the Religion Clauses. *Lynch v. Donnelly*, 465 U.S. at 673-78.

B. *Smith* Turns To Political Processes For Protection of Personal Liberty.

Smith undermines the Court's historic role to construe the language of the Constitution, to say what the law is and shape its direction. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). This Court has bound itself

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[10] *See* McConnell, *supra* note 5. *See* Laycock, *The Supreme Court's Assault on Free Exercise and the Amicus Brief That Was Never Filed*, 8 J. Law and Religion 99 (1990).

to construing the Constitution reasonably, giving terms their "natural and obvious" meaning and "not in a sense unreasonably restricted or enlarged." *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 326 (1816). Ultimately, "every clause in every constitution . . . must have a reasonable interpretation, and be held to express the intention of its framers." *Woodson v. Murdock*, 89 U.S. (22 Wall.) 351, 369 (1874). The import of *Smith* is that the Court will no longer say what burdens on what religious exercises are appropriate. It throws the matter to the judgment of legislatures for substance and direction, seriously jeopardizing protection of politically powerless minorities from majoritarian excess. As this Court said in *West Virginia v. Barnette*, a Bill of Rights vests individuals with enumerated rights beyond the power of the state unreasonably to regulate or restrict. 319 U.S. at 639. In our tradition, to date, the judiciary, not the legislature, interprets these rights according to the values sought to be protected by those who framed the provisions. Under *Smith*, except in very limited circumstances, the role of the judiciary is otherwise when the matter is the enumerated right to the free exercise of religion.

In many instances, the legislature or the executive may be a preferred (if not the only) mode for weighing and balancing competing claims of rights, especially where there is no agreement on the nature of the claimed right or on the degree to which it may legitimately be rooted in the Constitution. *See Webster v. Reproductive Health Services*, 492 U.S. 490, 521 (1989) (plurality) (commenting on role of the legislature). However, to depend primarily on legislatures and executives to protect the preferred position of an enumerated right like religion, when the majority opinion in *Smith* (and other cases) signal that religion need not be taken seriously, puts religious freedom at severe risk. For the most part, it is politically or administratively inconvenient for legislatures to enact particular exemptions, without compelling justification or

strong political motives. It subjects religion and religious practices to interference whenever the legislature believes it reasonable to do so (as long as it has some articulable basis), or worse, affirmatively abandons such regulation to shifting demographics. In tolerant regions, religion will be better off, one hopes. This path is particularly imprudent and improvident for the future of religious freedom. It is largely one of the Court's own creation, and within the Court's power to remedy.[11]

Moreover, the Court's decision in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989), suggests the prospect of affirmative neglect. There are limits to the very legislative process that the majority in *Smith* outlines as the "preferred" alternative to litigation. *Bullock* indicates that when religion is given the precise special treatment that the majority in *Smith* invites, the legislature nonetheless risks invalidity under the Establishment Clause. The Court has therefore created a dilemma. It has thrown the resolution of religious claims into the hands of political executives and political majorities but, at the same time, indicates that singular protection of religion, even religions that can command a popular majority, risks invalidity. Faced with this dilemma, the likely result will be inaction. To be an effective force in construing what the law is, the Court must be willing, as part of its historic jurisprudential duty under our system of government, to protect the rights of minorities and to say that these rights, absent grave reason, must be protected against the prerogatives of the majority.

C. The Court Undervalues Religion As A Special Constitutional Matter.

Bullock and *Smith* contribute to the attitude that religion simply does not matter more than any other asserted interest. The inclination of Americans early in this

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[11] Glendon, *Law, Communities, and the Religious Freedom Provisions of the Constitution*, 60 Geo. Wash. L. Rev. 672 (1992).

nation's history to use legal language in public discourse has today blossomed into the notion that what is legal is therefore moral.[12] The special place of religion therefore risks being undercut if our legal institutions fail to accord it the protection that the Framers intended. The Court deepens and lends a false legitimacy to a dangerous trend within our society to treat religion "like everything else" when, in cases like *Bullock* and *Smith*, it fails to accord religion the constitutional protection our Constitution demands.[13]

For example, until recently, it was fairly standard legal practice in real property law that churches were always permitted uses, which added to the value of a community and a neighborhood.[14] In an increasingly mobile and land-conscious society vying for space, it has become difficult to receive permissions from local planning commissions to build new churches to serve a population that moves, grows, and shifts. Even when land is available and religious groups are already part of the community, religious groups can sometimes face hostile treatment disguised as neutral land use control or building regulation. For example, historic preservation is an

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[12] M. Glendon, *Rights Talk* 1-4, 17, 56-61, 78-81, 87, 104, 154-55 (1991). A preeminent example of this attitude is found in the shift in public opinion following *Roe v. Wade*, 410 U.S. 113 (1973). Before *Roe*, political compromise on abortion resulted in governmental regulation far different from the regime of abortion on demand that has resulted from that decision. Once *Roe* enshrined abortion as a "right," public attitudes shifted. For some, that decision ended all further moral inquiry because they equate what is legal with what is moral. It has taken the religious and other leaders of this country nearly twenty years to explain, from a human and moral standpoint, what abortion really is.

[13] *See* McConnell, *The Religion Clauses of the First Amendment: Where is the Supreme Court Heading?*, 32 Cath. Law. 187, 188-89 (1989).

[14] Duerksen, *Regulating Religious Properties in the 1990's*, 14 Zoning & Planning Law Report 169 (1991).

important value, but can conflict with the rights of autonomous religious organizations to create their structures to express worship through architecture[15] or in particular services needed by the faith community. This is not to say that local legislatures and commissions should not attempt to resolve these claims in the first instance. However, after *Smith*, those decisions are effectively final—no compelling reason for any burden on religion will be demanded of government by an independent adjudicator.[16] Religion becomes, "like everything else," just another factor for evaluation. The losers simply go home, not to court.

Plainly, prior to *Smith*, application of a compelling interest analysis did not vigorously protect religious practices. Except in the area of unemployment compensation, many courts had been willing to defer to any articulated compelling interest without regard to its narrowness or the relationship between the interest asserted and the practice regulated. *See EEOC v. Townley Engineering & Mfg. Co.*, 859 F.2d 610, 622-25 (9th Cir. 1988) (Noonan, J., dissenting). On some occasions, this Court has not even explicitly applied the test. In cases involving public institutions such as prisons or the military,[17] or govern-

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[15] Carmella, *Houses of Worship and Religious Liberty: Constitutional Limits to Landmark Preservation and Architectural Review*, 36 Vill. L. Rev. 401, 460-75 (1991).

[16] *St. Bartholomew's Church v. New York*, 914 F.2d 348 (2d Cir. 1990), *cert. denied*, 111 S.Ct. 1103 (1991). In those jurisdictions which have not abandoned the idea that those who attack religious enterprises bear the burden of justifying the narrow nature of their assault and the compelling justification therefor, courts have reached different results. *Society of Jesus v. Boston Landmarks Commission*, 409 Mass. 38, 564 N.E.2d 571 (1990).

[17] *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987); *Goldman v. Weinberger*, 475 U.S. 503, 506-07 (1986). Those kinds of cases are exceptions anyway because of the public instituitonal character of the dependents. J. Jacobs, *Individual Rights and Institutional Authority* (1979).

ment proprietary interests,[18] the Court simply balanced interests. In other cases, the Court has been much more willing to defer to various assertions of administrative convenience, such as the interest in the uniform application of the tax laws, a code already riddled with numerous exceptions and special rules. Some commentators had come to refer to the Court's pre-*Smith* compelling interest jurisprudence as a "Potemkin Village."[19] *Smith* showed that it was a simple step to abandon it altogether.

It is time to set the record straight. Religion is a preferred constitutional value, entitled to benevolent treatment by government, including this Court. Certainly, in light of *Smith*, religion deserves better treatment than it is now receiving at the hands of courts and legislatures throughout the United States. Because religion matters, those who would curtail religious activity should bear the burden of showing why it must be regulated. The government should be required to demonstrate a narrowly drawn and significant compelling interest to justify inroads on religion.[20] There is much confusion about what *Smith*

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[18] *Bowen v. Roy*, 476 U.S. 693 (1986); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988).

[19] McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 Chicago L. Rev. 1120, 1121-22 (1990). One need only to examine *Lyng v. Northwest Indian Cemetery Protective Association, supra*, to see the extent to which the Court has gone: "Even if we assume that . . . [the highway] will 'virtually destroy the . . . Indians' ability to practice their religion' . . . the Constitution simply does not provide a principle that could justify upholding [the Indians'] legal claims. However much we might wish that it were otherwise, government simply could not operate if it were required to satisfy every citizen's religious needs and desires." 485 U.S. at 451-52.

[20] *See* Arg. II, B, *infra*. Citing *Smith*, many lower courts have declined to apply the compelling interest analysis in situations where religious beliefs or practices have been burdened. *See, e.g., Montgomery v. County of Clinton*, 743 F. Supp. 1253 (W.D. Mich. 1990), *aff'd mem.*, 940 F.2d 661 (6th Cir. 1991) (statute requiring an autopsy upheld despite claims that the autopsy violated religious beliefs); *United States v. Philadelphia Yearly Meeting of the Religious Society of Friends*, 753 F. Supp. 1300 (E.D. Pa. 1990) (third party tax levies upheld against religious organization that, at request of two employees, had refused to withhold a portion of their income taxes). In the latter case, the court stated a different result was possible under the pre-*Smith* test. 753 F. Supp. at 1305-06.

means,[21] whether it is limited to criminal cases or applies across the board,[22] displaces all compelling interest analysis for all time,[23] is simply an aberration,[24] or portends a greater change in protection of individual liberties.[25] Given the paucity of chances through which this Court may address free exercise jurisprudence, this case is perhaps the only vehicle available in the foreseeable future through which this Court may begin needed clarification and reform.

II. THIS COURT MUST GIVE CONTENT AND DIRECTION TO FREE EXERCISE JURISPRUDENCE.

The *Smith* majority seems to have been overly concerned with the multiplication, personalization, and seeming trivialization of claims framed in religious liberty language. *Smith*, 494 U.S. at 888. The Court narrowly focused on

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[21] *See, e.g., Salaam v. Lockhart*, 905 F.2d 1168, 1171 n.7 (8th Cir. 1990), where the court commented that "*Smith* does not alter the rights of prisoners; it simply brings the free exercise rights of private citizens closer to those of prisoners."

[22] *Compare Salvation Army v. Department of Community Affairs*, 919 F.2d 183, 195 (3rd Cir. 1990) (rejecting argument that *Smith* is confined to criminal statutes) *with NLRB v. Hanna Boys Center*, 940 F.2d 1295, 1305 (9th Cir. 1991) (suggesting that *Smith* is confined to criminal statutes).

[23] Some have suggested that in *Smith* "the Court wrote the First Amendment's guarantee of the free exercise of religion out of the Constitution." *The Religious Freedom Restoration Act: Hearings on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. (May 13, 1992) (statement of Nadine Strossen, President, American Civil Liberties Union).

[24] Glendon, *supra* note 11.

[25] *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2467 (1991) (Scalia, J., concurring).

the elements of individual claims demanding time and attention in the judicial system. To a certain extent the problem with which the majority struggled in *Smith* has at least two facets. One aspect of the problem is inherent in the nature of protection intended for religious claims; the other is part of this Court's case law. The first amendment gives a preference to claimants seeking judicial review of governmental action burdensome to religious practices. As will be explained further below, when these practices do not actually threaten the public health, safety, or order, or another person's life or property in a significant way, that claim, on its face, is entitled to redress. That person is entitled to redress because those who framed the Religion Clauses, in that complex mix of political, cultural, social, and legal concerns that found expression in the first amendment, intended it so. McConnell, *supra* note 5, 103 Harv. L. Rev. at 1510-13, 1516.

The other aspect of the problem, frankly, is one of the Court's own making. The Court has been unwilling to give a substantive interpretation to the Free Exercise Clause, content to allow claims to be raised and litigated in increasingly particular, personal, and sometimes contradictory ways. McConnell, *supra* note 13, 32 Cath. Law. at 195-98. This Court has given insufficient attention to the relationship between the Free Exercise and the Establishment Clauses. Beyond general comments about "play in the joints"[26] or complimentary "buttress[es]," [27] the Court has not indicated precisely the values that underpin both Clauses or even, apart from a few passing references, to attempt a homogenous construction of both aspects of the same section of the first amendment.[28] Moreover, the Court has not recently elaborated to any great extent on the meaning and import of a "compelling interest" analysis. Rather than defer to legislators and

[26] *Walz v. Tax Commission of New York*, 397 U.S. 664, 669 (1970).

[27] *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972).

[28] *See* Glendon & Yanes, *supra* note 4; McConnell, *supra* note 13.

executives, the Court should attempt to interpret what these protections mean. In the interest of aiding that kind of analysis, this *amicus* offers the following observations.

A. The Protection Of Religious Liberty.

The inability or unwillingness of the Court to interpret substantively the Free Exercise Clause contributes to the sense that it is an exhortation, not a conferral of rights. It encourages reduction of complex and difficult legal language to vague generalities about personal liberty. Like the Religion Clauses themselves, phrases and platitudes about them are pregnant with meaning, freighted with the concerns of people speaking in general terms to a potentially divisive, difficult, subtle and complex situation. They yield nothing to guide a useful interpretation of a constitutional provision. It is much more difficult to give an operational definition that, objectively, would be able to guide executives, legislators, and judges in construing the scope and direction of the Clauses. But that is what must be done.

With specific reference to the concern of the majority in *Smith* (494 U.S. at 888), one way to give content and direction to guide the adjudication of individualized claims would be to construe the Clauses according to their text, illuminated by history and tradition. Scholarship indicates that the Framers intended the vindication of personal religious rights against the government's power to regulate (except as described below). The Framers, in protecting personal religious liberty, sought to avoid, if possible, the choice between a temporal benefit (or proscription) and a matter of religious prohibition or obligation.[29] Not every individual value choice fits a standard involving matters of religious conviction in conflict with the power of the state in the way the Framers envisioned

[29] *See* McConnell, *supra* note 5, at 1511-17.

in the Religion Clauses. The precise conundrum occurs in some circumstances more than others.

At a minimum, the freedom to preach, practice, and proselytize when restricted by the state creates a conflict between obligations. *McDaniel v. Paty*, 435 U.S. 618, 626 (1978). Interference with the freedom to organize and operate a religious community institutionally separate from other secular or religious organizations in that society is another like situation. *See Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1872). Any impairment of the liturgical, worship, and ritual life of that religious community results in a conflict with constitutional rights. *Presbyterian Church (U.S.A.) v. United States*, 752 F. Supp. 1505 (D. Ariz. 1990). Religion enjoys the freedom to select who ministers to that community in accord with its doctrine free of interference by the state. *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986). Attempts to dictate these choices by secular standards create the kind of conflict foreseen by those who framed the Religion Clauses. Consistent with the values underlying the Religion Clauses, the Court should offer strong protection, at a minimum, for these practices borne of deep religious belief.[30]

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[30] By definition, this formulation does not necessarily involve those matters which do not go to the freedom to believe or practice in peace—matters which are virtually indistinguishable from the kinds of concerns that any other person could raise. One obvious example would be taxpayer injury. A religious adherent may have a strong sense of indignation about the payment of taxes on account of some religious belief or value but the injury stated does not in any way affect the ability of that individual to practice his or her religion. *See Board of Education v. Allen*, 392 U.S. 236 (1968); *Tilton v. Richardson*, 403 U.S. 672 (1971); *cf. In re United States Catholic Conference*, 885 F.2d 1020 (2d Cir. 1989), *cert. denied*, 495 U.S. 918 (1990). In the absence of clear direction from this Court, those claims may persist.

B. The Circumstances Under Which Religious Liberty Claims May Be Impaired By The State.

A simple recitation by the government that it has an interest that *it asserts* is compelling is not enough. This Court should return to a starker, more demanding formulation when the above kinds of religious claims are involved. As this Court said in *Cantwell*, that kind of interest should be "narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the state. . . ." *Cantwell v. Connecticut*, 310 U.S. at 311. As restated subsequently in *West Virginia v. Barnette*, the preferred place for religious exercise is "susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect." 319 U.S. at 639. *See also Thomas v. Collins*, 323 U.S. 516, 530 (1945).

Cases approving the imposition of state controls over religious practices illustrate the kinds of grave and immediate threats to important state interests which the Court has recognized. The government has inherent power to protect life or property. Obvious conflicts in which religious practices might yield are threats to the public health and safety, such as might occur in excusing vaccination, *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), or avoiding enforcement of child labor laws, *Prince v. Massachusetts*, 321 U.S. 158 (1944). Where a religious practice might also directly affect the life or the property of another person, the state may have adequate reason to regulate religious practices. *State v. Massey*, 229 N.C. 734, 51 S.E.2d 179 (1949).[31] Where the interest articulated by the state is important, but does not seek to avert a clear and immediate danger to public health and safety, life or property, that interest would seem to yield under appropriate circumstances. A primary exam-

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[31] Abortion too presents a clear and immediate danger to human life and therefore warrants the strongest kind of governmental protection, even when abortion is allegedly sought on the basis of religious belief.

ple is *Wisconsin v. Yoder*, 406 U.S. at 217-18, 229-30, in which the substantial interest in education yields to the religious interest of parents in the formation of their children. There the state could not sustain its burden to prove there was any threat "to the physical or mental health of the child or to the public safety, peace, order, or welfare. . . ." *Id.*

Without this kind of reformulation of both the content of religious liberty or the meaning of a compelling interest analysis, the Court allows an unfortunate and frustrating trend to continue. Under *Smith*, a practice grounded in deeply experienced religious conviction is indistinguishable from a matter of personal caprice. This is neither good law nor good policy. It invites reconfirmation of *Smith*, sweeping too broadly to be legitimate constitutional process. Because this Court has contributed to the persistence of this problem, and because *Smith* is not a sufficient answer, this Court should attempt a better resolution.

CONCLUSION

The Conference takes no side in the instant dispute. Nonetheless, because the proper interpretation of *Employment Division v. Smith* is raised for this Court's consideration by the parties, the Conference explains why *Smith* should be re-examined and abandoned.

Respectfully submitted,

MARK E. CHOPKO *
General Counsel

JOHN A. LIEKWEG
Associate General Counsel

U. S. CATHOLIC CONFERENCE
3211 Fourth Street, N.E.
Washington, D.C. 20017-1194
(202) 541-3300

* Counsel of Record

Of Counsel:

MICHAEL F. MOSES
Attorney

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